

Appeal from decision of Colorado State Office, Bureau of Land Management, canceling right-of-way application C-25877-RW.

Affirmed.

1. Federal Land Policy and Management Act of 1976: Rights-of-Way -- Rights-of-Way: Applications --Rights-of-Way: Cancellation

The Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1761(b)(1), states that the Secretary shall require an applicant for a right-of-way to submit certain information prior to the issuance of the right-of-way, and an application for such right-of-way is properly canceled where the applicant fails to comply with the requirements.

APPEARANCES: John W. Barbee, for appellants.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

John W. Barbee, Karla Tschoepe, and David Willis appeal from a decision of the Colorado State Office, Bureau of Land Management (BLM), dated October 21, 1980, canceling their right-of-way application C-25877-RW filed under the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1761 (1976), for failure to submit additional data on the right-of-way as requested by BLM.

Appellants own two 40-acre tracts of land which touch at one corner and are surrounded on three sides by Federal mineral lands. On September 15, 1977, they applied for an underground tramroad through Federal coal deposits in the NE 1/4 SE 1/4 sec. 28, T. 13 S., R. 92 W., sixth principal meridian. Their application stated that the right-of-way was needed to provide access from one holding to the other. At the

time appellants' application was made, however, BLM had no authority under FLPMA to grant such a right-of-way through Federal mineral deposits. BLM informed the applicants of the problem by letter of February 16, 1978, and stated that, in any event, FLPMA and 43 CFR 2800 would ultimately require at least the following submissions:

I. A map (not necessarily a survey map), showing the approximate location of all facilities to be constructed in conjunction with the right-of-way project, regardless of land ownership. This is in addition to the survey map showing the location of the proposed right-of-way on public land. A project oriented map is required so that the Bureau can analyze the effects on existing and possible future right-of-way corridors.

II. This map must be accompanied by a narrative including:

A. A statement that the applicant agrees that the right-of-way, if approved, will be subject to the terms and conditions of the applicable regulations.

B. A statement justifying the width of the haulage right-of-way. This statement must place special emphasis upon:

- a. Ground which will be occupied by the proposed project;
- b. Space necessary for operation and maintenance;
- c. Necessity to protect public safety;
- d. Prevention of unnecessary damage to the environment.

BLM emphasized that these requirements were only "an estimate of the additional legal requirements to which your application may be subject." BLM ended its letter by stating that the applicants should take no further action until BLM's authority in this matter had been clarified.

On October 30, 1978, P.L. 95-554, 92 Stat. 2073, was enacted, which amended the Mineral Leasing Act of 1920, 30 U.S.C. § 201(a) (1976), and enabled BLM to proceed with the processing of appellants' application under title V of FLPMA. By letter of January 9, 1979, BLM informed appellants that it now had authorization to proceed with the processing of the application and requested the following information in addition to the information requested in BLM's letter of February 16, 1978:

1. Proof of sufficient financial backing and technical expertise to construct and operate the right-of-way.

2. A statement setting forth the requested term of the grant. The Bureau will not usually grant a right-of-way in excess of thirty years, however, you may request a right of renewal. The application must include a rationale for the requested term, showing that it is reasonable in light of all circumstances concerning the proposed project. The submitted rationale must include: the cost of the proposed facility; its anticipated useful life; and the public purpose it will serve.

3. Copies and disclosure of all plans, contracts, agreements, or other information reasonably related to the proposed use of the right-of-way, including its effect on competition.

In the event the estimated right-of-way processing costs exceed \$5,000.00 you will be billed for the actual costs of processing and your prior payment will be credited to the total bill.

On August 12, 1979, appellants requested that their application be held in abeyance due to the financial burden of complying with BLM's requirements. BLM gave appellants until September 24, 1980, to submit the required information. In its decision of October 21, 1980, BLM stated that no further data had been submitted and canceled the application pursuant to 43 CFR 2802.3-5 and 43 CFR 2802.4(c).

In its statement of reasons, appellants contend that the denial of the tramroad permit essentially denies them reasonable access; that BLM's requirements for processing the application are beyond the technical and financial means of the applicants, whose primary interest is in leasing the premises to a mining concern; that the cancellation of the application works a hardship on the applicants because the value of the properties is based to a large degree on its accessibility as seen by a potential lessee/operator; and that the absence of a pending application materially affects the feasibility of their private holding as a viable mining site.

[1] Use or occupancy of public land granted subsequent to FLPMA must be issued under authority of that Act. 43 U.S.C. § 1732(b) (1976); William J. Colman, 40 IBLA 180 (1979); Arthur G. Lane, Jr., 38 IBLA 297 (1978). In authorizing the Secretary to grant rights-of-way pursuant to FLPMA, 43 U.S.C. § 1761(b)(1) (1976), provides that:

[T]he Secretary concerned shall require, prior to granting, issuing, or renewing a right-of-way, that the applicant submit and disclose those plans, contracts, agreements, or

other information reasonably related to the use, or intended use, of the right-of-way, including its effect on competition, which he deems necessary to a determination, in accordance with the provisions of this Act, as to whether a right-of-way shall be granted, issued, or renewed and the terms and conditions which should be included in the right-of-way.

See 43 CFR 2802.3 and 43 CFR 2802.4; see also Solicitor's Opinion, 86 I.D. 293 (1979). The requirements enumerated in the State Office letters of February 16, 1978, and January 9, 1979, are consistent with this provision and with the regulations issued pursuant to it. BLM properly canceled appellants' application for failure to comply with its requirements. William J. Colman, supra.

Insofar as appellants request that action on their application be held in abeyance, we point out that applications for any use should only be made after an appellant's plans have coalesced so that the application may be processed in due course. See Wyoming Water, Inc., 56 IBLA 139 (1981). Premature filings should be avoided. Appellants are, of course, at liberty to reapply at some future date should they decide that it is feasible to comply with BLM's request for information.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

James L. Burski
Administrative Judge

We concur:

Douglas E. Henriques
Administrative Judge

Gail M. Frazier
Administrative Judge